

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

UNITED STATES OF AMERICA . CRIMINAL NO. 09-10017-GAO
V. . BOSTON, MASSACHUSETTS
. NOVEMBER 18, 2008
TAREK MEHANNA .
Defendant .
.

TRANSCRIPT OF DETENTION HEARING
BEFORE THE HONORABLE LEO T. SOROKIN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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I N D E X

<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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Government's:

Andy Nambu	9	13		
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<u>EXHIBITS</u>	<u>DESCRIPTION</u>	<u>IN EVIDENCE</u>
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1	Affidavit in support of Complaint	11
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2	Affidavit in support of detention	13
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P R O C E E D I N G S

CASE CALLED INTO SESSION

THE CLERK: Today is November 18th. The case of United States v. Mehanna, Docket Entry No. 08-148 will now be heard before this Court. Counsel; please identify themselves for the record.

MR. AUERHAHN: Good afternoon, Your Honor, Jeffrey Auerhahn and Al Chakravarty for the United States.

THE COURT: Good afternoon.

MR. CHAKRAVARTY: Good afternoon.

MR. CARNEY: Good afternoon, Your Honor, J.W. Carney Jr. With me is my colleague Steven Morrison for the defendant.

THE COURT: Good afternoon. Good afternoon, Mr. Mehanna. I have a couple questions cause I wasn't here at the initial appearance. Was Mr. Mehanna arraigned - oh, it's on a complaint, right?

MR. AUERHAHN: It's on a complaint, Your Honor.

THE COURT: So you completed the initial appearance?

MR. CHAKRAVARTY: Clearly a Rule 5, Your Honor.

THE COURT: All right. Mr. Carney, are you here by appointment under the CJA Act or are you retained? Or is that--

MR. CARNEY: By appointment, Your Honor.

THE COURT: What'd you say?

MR. CARNEY: By appointment, Your Honor.

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1 THE COURT: All right. And did Judge Dein already
2 review a financial affidavit and formally appoint you or was
3 that deferred to today?

4 MR. CARNEY: That was done before that, Your Honor.

5 THE COURT: Oh. All right. You have a, either a -
6 you can provide after, Mr. Carney, that's fine.

7 MR. CARNEY: Thank you, Your Honor.

8 THE COURT: Just so I'm familiar with it either the,
9 isn't it under the docket number of the matter when that was
10 done.

11 MR. CARNEY: I will, Your Honor. Thank you.

12 THE COURT: Okay. Fine.

13 MR. CARNEY: If I could just have one moment.

14 THE COURT: Yup.

15 PAUSE

16 MR. CARNEY: Thank you, Your Honor.

17 THE COURT: All right. Next, I got - I'm not sure if
18 this was, somebody submitted to me, one of the two of you, a
19 two page order.

20 MR. AUERHAHN: It's a culmination, Your Honor.

21 THE COURT: All right.

22 MR. AUERHAHN: There was an assented to motion and I
23 believe Mr. Carney submitted--

24 THE COURT: And Mr. Carney and Mr. Morrison signed
25 it. There's a spot for your client to sign it, Mr. Carney. If

1 he signs it I'm happy to sign it.

2 MR. CARNEY: If it please the Court, I have another
3 copy of the protective order that has the defendant's signature
4 as well as the signatures of my secretary and legal assistant.
5 I would ask that the protective order be submitted under seal--

6 THE COURT: All right.

7 MR. CARNEY: --rather than have their names be
8 publicly available on the record.

9 MR. AUERHAHN: We have no objection, Your Honor.

10 THE COURT: Fine.

11 MR. CARNEY: Thank you.

12 THE COURT: I'll seal the protective order.

13 MR. CARNEY: Your Honor, I'm handing you the
14 protective order.

15 THE COURT: All right. And, Mr. Mehanna, this
16 document that Mr. Carney just gave me you signed?

17 THE DEFENDANT: Yes, that's correct.

18 THE COURT: All right.

19 Mr. Carney, you've got to sign.

20 MR. CARNEY: Oh.

21 THE COURT: There's a place for your signature.

22 MR. CARNEY: Actually the previous document that had
23 been submitted--

24 THE COURT: Has your signature.

25 MR. CARNEY: --has my original signature--

1 THE COURT: And these are the same?

2 MR. CARNEY: --and Mr. Morrison's. Yes, they're
3 identical documents with simply the addition of other names.

4 THE COURT: I understand.

5 MR. CARNEY: For example if another lawyer in my
6 office becomes involved in the case I will have him or her sign
7 an identical copy--

8 THE COURT: Right.

9 MR. CARNEY: --of the protective order.

10 THE COURT: All right. The protective order is
11 entered and sealed and there are the two originals with all the
12 signatures.

13 All right, somebody, Mr. Chakravarty or Mr. Auerhahn,
14 one of you filed an envelope of documents. Was that envelope
15 of documents for me to read or just to have on file?

16 MR. AUERHAHN: Well we provided a copy of the
17 discovery that was provided to the defense.

18 THE COURT: Okay.

19 MR. AUERHAHN: But Your Honor should get a courtesy
20 of the same discovery.

21 THE COURT: Okay. Fine. All right.

22 MR. AUERHAHN: Just one other thing, Your Honor. I
23 did file electronically yesterday Agent Nambu's affidavit in
24 support of detention.

25 THE COURT: I got that.

1 MR. AUERHAHN: Okay.

2 THE COURT: I've read that.

3 MR. AUERHAHN: And we will introduce the original as
4 an exhibit today both a copy of the affidavit in support of the
5 complaint which is already in the record, but we'll mark it as
6 two exhibits for the purpose of detention and probable cause.

7 THE COURT: All right. I mean I'm happy to take
8 judicial notice of the complaint and have it serve as direct
9 testimony subject to cross examination. If you want to
10 introduce another copy to complete the record in some fashion
11 that's fine but for my own purposes I don't need that.

12 MR. AUERHAHN: Okay.

13 THE COURT: All right, so we - anything else,
14 Mr. Carney, before we proceed to the detention hearing?

15 MR. CARNEY: Yes, Your Honor. I had submitted a
16 motion to the Court for release on bail.

17 THE COURT: I've got that.

18 MR. CARNEY: With attachments.

19 THE COURT: I just read it--

20 MR. CARNEY: And--

21 THE COURT: This.

22 MR. CARNEY: --what - what I would, yes, Your Honor.
23 What I was not able to include were letters of support in the
24 form of character letters. I have provided them to the
25 government and I would like to offer the originals to Your

1 Honor.

2 THE COURT: Fine. I'll take them.

3 You guys can - we're going to pause one minute in
4 this case. You can all stay right there and just, Ms. Sullivan
5 and Mr. Dempsey, why don't you come forward and we'll just take
6 care of that status conference so you can be on your way.

7 PAUSE

8 THE CLERK: The Mehanna session is back in session.

9 THE COURT: Okay, so I have those letters, Mr.
10 Carney. I will read them. Mr. Chakravarty or Mr. Auerhahn,
11 could you remind me cause I wasn't at the initial appearance,
12 what were the bases that you are moving on for detention?

13 MR. AUERHAHN: Under 3142(f)(2)(A) and (f)(2)(B).

14 THE COURT: All right.

15 MR. AUERHAHN: The risk of flight as well as risk
16 of--

17 THE COURT: And under (f)(2)(A) which subsection
18 would this be?

19 MR. AUERHAHN: Which subsection--

20 THE COURT: It is, in other words--

21 MR. AUERHAHN: (A) is the subsection of a serious
22 risk that a person will flee. (f)(2)(B) is a serious--

23 THE COURT: Oh, just flight. I'm sorry.

24 MR. AUERHAHN: Right. Right, I'm sorry, yes, the
25 statutory presumes--

1 THE COURT: You're moving on just flight and
2 obstruction? Okay, I got it. Okay. Go ahead.

3 MR. AUERHAHN: The United States calls Special Agent
4 Andy Nambu.

5 GOVERNMENT WITNESS, ANDREW NAMBU, SWORN

6 DIRECT EXAMINATION

7 BY MR. AUERHAHN:

8 Q. Sir, can you please identify yourself for the record
9 giving us your full name and spelling your last name?

10 A. Andrew B. Nambu, N-A-M-B-U.

11 Q. And how are you employed, sir?

12 A. Yes, I am.

13 Q. How are you employed?

14 A. With the FBI.

15 Q. And just very generally what's the general investigative
16 jurisdiction of the FBI?

17 A. Covers federal violations under Title 18.

18 Q. And are you assigned to the JTTF?

19 A. I am.

20 Q. And again generally what's the investigative jurisdiction
21 of JTTF?

22 A. Generally we investigate persons who may be involved in
23 terrorist organizations and things of that nature.

24 Q. Does that include crimes committed overseas by both U.S.
25 citizens and others?

1 A. Yes.

2 Q. Now specifically with reference to an individual named
3 Daniel Maldonado, is he the target of an FBI investigation?

4 A. He was.

5 Q. And was it an FBI investigation by the JTTF?

6 A. Yes.

7 Q. Here or elsewhere?

8 A. It was not in Boston. It was elsewhere?

9 Q. Now in connection with the investigation that resulted in
10 the arrest of Tarek Mehanna were you the case agent on that
11 investigation?

12 A. No.

13 Q. But were you on the same squad that, out of which that
14 investigation was conducted?

15 A. Yes.

16 Q. Now sir, you weren't the case agent but were you the
17 affiant in support of the complaint in this matter?

18 A. Yes, I was.

19 MR. AUERHAHN: And if I can approach, Your Honor?

20 THE COURT: You may. You don't have to ask again?

21 MR. AUERHAHN: Thank you.

22 BY MR. AUERHAHN:

23 Q. I've placed before you Exhibit 1 and did you recognize
24 what that is?

25 A. Yes.

1 Q. And is that your affidavit in support of a complaint in
2 this matter?

3 A. Yes, it is.

4 Q. And sir, I had, in the affidavit in support of a complaint
5 you talk about an interview with the defendant on December 16,
6 2006; is that correct?

7 A. Yes.

8 Q. And as of that day was Daniel Maldonado the target of the
9 investigation you earlier referred to?

10 A. Yes.

11 Q. Okay.

12 MR. AUERHAHN: And, Your Honor, although you stated
13 earlier you take judicial notice just for the record--

14 THE COURT: You'd offer. Any objection?

15 MR. CARNEY: No, Your Honor. Thank you.

16 THE COURT: All right, Exhibit 1 is in evidence.

17 GOVERNMENT EXHIBIT NO. 1, ADMITTED

18 BY MR. AUERHAHN:

19 Q. Now in connection with the warrant that was issued as a
20 result of the issuance of the complaint in this matter, was an
21 individual arrested on Saturday November 8, 2008?

22 A. Yes.

23 Q. And who was that individual?

24 A. Tarek Mehanna.

25 Q. And is he in the courtroom today?

1 A. Yes.

2 Q. Can you identify him to the Court and the record, please?

3 A. He's the gentleman sitting in the green shirt.

4 MR. AUERHAHN: May the record reflect he's identified
5 the defendant?

6 THE COURT: Yes.

7 BY MR. AUERHAHN:

8 Q. Now, sir, let me place before you Exhibit 2. And do you
9 recognize what that is?

10 A. Yes.

11 Q. What is that?

12 A. This is the affidavit that we filed today for detention.

13 Q. Okay. And that one is the signed original signed by you?

14 A. Yes.

15 Q. And it's based on information you received some of which
16 came to your possession during the day of the arrest and
17 subsequent information?

18 A. Yes.

19 Q. As well as information before the arrest?

20 A. Correct.

21 MR. AUERHAHN: Your Honor, I would move into evidence
22 Exhibit 2.

23 THE COURT: Any objection?

24 MR. CARNEY: No objection, Your Honor. Thank you.

25 THE COURT: All right, it's in evidence.

1 GOVERNMENT EXHIBIT NO. 2, ADMITTED

2 MR. AUERHAHN: And, Your Honor, for these purposes I
3 rely on the submissions and Mr. Carney can cross examine.

4 THE COURT: All right. Go ahead, Mr. Carney.

5 MR. CARNEY: May I have one second please, Your
6 Honor?

7 THE COURT: You may.

8 PAUSE

9 CROSS EXAMINATION

10 BY MR. CARNEY:

11 Q. Good afternoon, Agent Nambu.

12 A. Good afternoon, sir.

13 Q. You have discussed the case and the investigation with the
14 case agent in this matter, haven't you?

15 A. I have.

16 Q. I have a few questions concerning the investigation. You
17 related both orally today, sir, and in your affidavit that
18 colleagues of yours in the JTTF made a decision to seek out
19 Mr. Mehanna and question him; is that correct?

20 A. Yes.

21 Q. When was that decision made to go see Mr. Mehanna?

22 A. Precisely I'm not sure.

23 Q. To the best of your knowledge how many hours or days
24 before December 16th was it, the decision made?

25 A. I don't know the answer to that.

1 Q. Do you know--

2 THE COURT: I'm sorry, December 16th of which year?

3 MR. CARNEY: 2006, Your Honor.

4 THE COURT: That's the date of the - oh, that's the
5 interview of the FBI after the phone call?

6 MR. AUERHAHN: Correct, Your Honor.

7 THE COURT: A couple days after the phone call?

8 MR. CARNEY: Yes, Your Honor.

9 THE COURT: Okay. Go ahead.

10 MR. CARNEY: The statements made allegedly by Mr.
11 Mehanna on December 16th--

12 THE COURT: That form the basis--

13 MR. CARNEY: --2006 that form the basis of the
14 complaint.

15 BY MR. CARNEY:

16 Q. Do you know approximately how early or before December 16th
17 the decision was made?

18 A. I don't.

19 Q. What was the reason why the agent wanted to speak to
20 Mr. Mehanna?

21 MR. AUERHAHN: Objection.

22 THE COURT: Why is that relevant, Mr. Carney?

23 MR. CARNEY: Because it may put in context the
24 materiality of the interview.

25 THE COURT: I'm - maybe I'm just missing it. In -

1 how?

2 MR. CARNEY: Maybe the materiality will be more
3 apparent as I continue with my questions.

4 THE COURT: All right.

5 MR. CARNEY: So if I may hold off on this one--

6 THE COURT: Fine.

7 MR. CARNEY: --and proceed down the path I might
8 illuminate it--

9 THE COURT: Sure.

10 MR. CARNEY: --more.

11 THE COURT: All right.

12 BY MR. CARNEY:

13 Q. When the agents made the decision to go and see
14 Mr. Mehanna what did they want to ask him about?

15 A. As I--

16 MR. AUERHAHN: Objection. The issue is what they
17 asked him, actually more important really than what they asked
18 him the issue is what he said to them and whether he knew it
19 was untrue. What their state of mind with reference to why
20 they asked certain questions or what they were asking him
21 doesn't seem to go to the issue of materiality of his false
22 statement.

23 THE COURT: Is the materiality argument basically
24 that they already knew everything that--

25 MR. AUERHAHN: I'm sorry, Your Honor?

1 THE COURT: I'm asking Mr. Carney, is the
2 materiality argument that they already knew those things that
3 he didn't tell him, that he did not tell them but presumably
4 would have told them if in fact this is a true charge and if in
5 fact he were telling the truth and therefore--

6 MR. CARNEY: Yes, sir.

7 THE COURT: --it's not material?

8 MR. CARNEY: Yes, sir. And the only way that I can
9 establish that is what did they want to ask him and what did
10 they know before they did.

11 THE COURT: Well presumably what they wanted to ask
12 him is what they did ask him, right?

13 MR. CARNEY: Well, I guess I'm just trying to lay the
14 foundation. I can skip this question too and we'll go to the
15 next one.

16 The COURT: Why not just ask him what they did ask
17 him and if they asked him or if they already knew what,
18 whatever it is that would render it not material? I think
19 their state of - I understand why you were going to their state
20 of mind but maybe you can get there more directly and--

21 MR. CARNEY: All right.

22 BY MR. CARNEY:

23 Q. The agent asked him about his trip to Yemen on that
24 occasion?

25 A. Yes.

1 Q. And what was the reason they wanted to ask those
2 questions?

3 MR. AUERHAHN: Objection. Again, Your Honor, he's
4 charged with lying with reference to Daniel Maldonado. The
5 issue is what he said and whether or not it was true and
6 whether he knew it was untrue not--

7 THE COURT: Well is there a materiality element in
8 1001?

9 MR. AUERHAHN: I'm sorry?

10 THE COURT: Is there a materiality element in 1001?

11 MR. AUERHAHN: Yes, but I think Mr. Car - well first
12 of all he's asking about questions other than the Maldonado lie
13 which is relevant to this case. So that's my first objection
14 to this particular question. But secondly in terms of would it
15 have affected their investigation, that's an obstruction
16 question. That's not a materiality question. The question is
17 whether or not the false information he provided--

18 THE COURT: But that would go to whether or not he
19 should be detained for obstruction, wouldn't it?

20 MR. AUERHAHN: But, well whether or not - in terms of
21 the objection prong we're alleging is that there's a danger
22 that he might try to influence or intimidate witnesses in this
23 case and since there are cooperating witnesses who are, who
24 have the potential of being intimidated or otherwise obstructed
25 that's a different question than whether or not in fact by his

1 false answer he completely obstructed the FBI.

2 THE COURT: So you're not making any detention
3 argument that he had any intent to obstruct at that time?

4 MR. AUERHAHN: Well he had, he provided false
5 information because he intended to protect his friend who was
6 in Somalia fighting on behalf of al-Qaeda and aligned forces.
7 So, but what I'm saying is we don't have to prove that he in
8 fact obstructed the investigation which is what Mr. Carney's
9 arguing. We do believe he had the intent to do so but we don't
10 have to prove that he in fact obstructed the investigation
11 which is what Mr. Carney's saying. In other words he's saying
12 well if they already knew everything then he didn't obstruct
13 their investigation but that's a different--

14 THE COURT: Is that what you're saying?

15 MR. CARNEY: No.

16 THE COURT: What are you saying?

17 MR. CARNEY: I don't have those words put in my
18 mouth. What I do want to say is the government thought all of
19 these areas were relevant enough to put in their affidavit
20 before you. They discussed or they put in the affidavit that
21 they discussed with my client his travels to Yemen. So that
22 the government says that's relevant to put in direct
23 examination, but when I ask about it on cross examination it
24 suddenly is irrelevant? I submit that just because the
25 government wants to limit the cross examination to a particular

1 area that's not proper if they have opened up that area on
2 direct examination which they've done by submission of the
3 affidavit.

4 MR. AUERHAHN: Your Honor, I apologize but I don't
5 believe we addressed the other aspects of the interview on
6 December 16th in any of the affidavits. I think we've very
7 narrowly focused on the information with reference to
8 Mr. Maldonado. Perhaps Mr. Carney can point to a sentence or
9 paragraph that I've overlooked.

10 THE COURT: What about that?

11 MR. CARNEY: Well if that's true then I stand
12 corrected.

13 MR. AUERHAHN: Your Honor, in fact on paragraph eight
14 of the affidavit--

15 THE COURT: This is the complaint affidavit?

16 MR. AUERHAHN: Of the complaint affidavit we
17 specifically say although much of the interview concerned a
18 trip by Mehanna and two other individuals to Yemen in 2004
19 Maldonado was asked, also asked about Daniel Maldonado. So we
20 clearly are focusing directly on the false information about
21 Maldonado and not on anything he was asked or answered with
22 reference to the Yemen trip.

23 MR. CARNEY: Then I, I'm correct, they did mention
24 that they asked him a lot of questions about Yemen.

25 The COURT: Right, but that parenthetical doesn't

1 really - if I struck that from the complaint affidavit it
2 would make no difference to any of the analysis here. What I
3 understood that to be when I read it was simply we talked to
4 him about a lot of other things and what we really want to tell
5 you about is this and in the way that they say in the
6 affidavit, I think they say it in this one, if not it's said in
7 almost all of them, there's a lot of other evidence but we're
8 not telling you all of it, we're only telling you what we want
9 to rely on. The other evidence they didn't tell me about is
10 not before me.

11 MR. CARNEY: I respectfully submit that if this
12 criminal case is based on a single conversation at, with my
13 client on December 16, 2006 and the government adverts to that
14 conversation in its affidavit I should at least be given the
15 leeway to ask questions about that very conversation between
16 the agent and the defendant.

17 THE COURT: So what's the question again?

18 MR. CARNEY: Did you discuss with him the subject of
19 his recent trip to Yemen. Answer, yes. Why did you talk to
20 him about his trip to Yemen?

21 THE COURT: I guess the, the what would be more - I'm
22 just wondering about the why. Why do I care what, no
23 disrespect to the agent but what difference does it make to me
24 what was in the agent's mind?

25 MR. CARNEY: Because that might have had a material

1 relation to an investigation. And if all of that information
2 were true--

3 THE COURT: I mean if they'd asked him about Yemen
4 and--

5 MR. CARNEY: --then it may suggest Maldonado was a
6 throw away.

7 THE COURT: Well I mean they had another
8 investigation. They had other things they were investigating.
9 They asked him about those other things and he told the truth
10 about them. The inference is cause it's not in the complaint
11 affidavit and otherwise not charged and that--

12 MR. CARNEY: And Maldonado was a throw away question.
13 That was not really material.

14 THE COURT: All right, I see the argument.

15 MR. CARNEY: I'm not going to do a search and destroy
16 mission on Yemen.

17 THE COURT: Right.

18 MR. CARNEY: I'm just trying to set the stage for
19 what was discussed.

20 THE COURT: There seems to be some relevance to that.
21 It might not be, I'm not saying that I rely on it or not but
22 it's an argument that has some relevance. Why can't he do
23 that?

24 MR. AUERHAHN: Again, Your Honor, I think the issue
25 is was the statement he made, even if it was they were walking

1 out the door and oh by the way one more question. I'm not
2 saying that's what happened.

3 THE COURT: No, I understand.

4 MR. AUERHAHN: But even if it were the issue is what
5 did he tell them? Was it true? Did he know it was a lie?
6 That's point number one. Point number two, the agent has
7 testified that Daniel Maldonado on December 16, 2006 was the
8 subject of a JTTF investigation by Houston FBI. So whether it
9 was a throwaway line because it wasn't the principle focus of
10 the--

11 THE COURT: Why don't you do this--

12 MR. AUERHAHN: --questioning or not is irrelevant.

13 THE COURT: Mr. Carney, I mean I guess the first
14 instance will be more it seems to me to that argument you're
15 making more relevant to me is, you know, how much of the time
16 was - those kinds of questions rather than just what was in
17 his, what was in their head. I'm assuming that everything they
18 asked him about related to some investigation or investigations
19 that they were undertaking. I assume they did not ask him any
20 questions that were in their mind unrelated to something they
21 were investigating at all.

22 MR. CARNEY: May I test that assumption?

23 THE COURT: Yes.

24 BY MR. CARNEY:

25 Q. Was the fact that Mr. Mehanna had gone to Yemen part of an

1 active investigation by TTF?

2 A. The JTTF, sir?

3 Q. JTTF, I'm sorry.

4 A. Not being the case agent I'm not sure what the focus was
5 other than--

6 Q. To the best of your knowledge about this entire case was
7 Mr. Mehanna under investigation because of his trip to Yemen?

8 MR. AUERHAHN: Objection, Your Honor.

9 THE COURT: All right, what's the objection?

10 MR. AUERHAHN: The objection is it's irrelevant to
11 even the issue of - it goes back to what Your Honor suggested
12 which is the purpose of their questions isn't relevant to
13 whether the statement that's before you that's the subject of
14 the complaint, whether that was material. If Mr. Carney wants
15 to ask in an artful way whether the statements made by the
16 defendant were material to the FBI that's--

17 THE COURT: Well but he's entitled to test the
18 material is he not, right, not just ask the ultimate question,
19 right. Right, I mean in the end materiality is some sort of
20 legal factual determination and he doesn't only have to ask
21 the--

22 MR. AUERHAHN: Correct, but the materiality of other
23 statements in an interview conducted by the FBI which clearly
24 spanned more than just the questions about Mr. Maldonado I
25 can't see how that would either impeach the witness and/or

1 impeach the materiality of the Maldonado statements which is
2 really what's at issue here. The danger here is that we're
3 attracting the Court with and discussing other aspects of this
4 case which have nothing to do and it's very much focusing on
5 the relevancy to this case which is that the question of
6 whether there's probable cause and whether any of this goes to
7 the detention decision.

8 THE COURT: All right.

9 MR. AUERHAHN: And I cannot see how--

10 THE COURT: I'll sustain that objection. Go to the
11 next question, Mr. Carney.

12 MR. CARNEY: So I'm not able to ask if what Your
13 Honor said was an assumption was indeed true which is all I'm
14 trying to ask. Your Honor said well I assume that blah, blah,
15 blah and I said let's test it.

16 THE COURT: I'm no longer assuming.

17 MR. CARNEY: And I will ask him.

18 THE COURT: I'm no longer assuming that. I think I
19 assumed too quickly.

20 BY MR. CARNEY:

21 Q. What did the defendant say about his trip to Yemen?

22 A. As I recall from the report I believe it was a trip to
23 study for education purposes.

24 Q. And what questions did the agent ask him in follow up to
25 that?

1 A. I don't know.

2 Q. Have you read the report regarding--

3 A. I did.

4 Q. --the interview with Mr. Mehanna?

5 A. I did.

6 Q. Did it include information about Yemen?

7 A. It did.

8 Q. That was a subject that they were questioning him about,
9 correct?

10 A. Yes.

11 Q. Do you know if that was because that subject was under
12 active investigation by your unit?

13 MR. AUERHAHN: Objection.

14 THE COURT: Just remind me again, Mr. Carney, despite
15 all this back and forth with everybody why would it matter if
16 it is or is not under an active investigation if he knows?

17 MR. CARNEY: Because if the focus of questioning Mr.
18 Mehanna--

19 THE COURT: Was something other than--

20 MR. CARNEY: --were about Yemen and that's what the
21 majority of the time was spent talking about with Mr. Mehanna
22 and the question about Mr. Maldonado was simply almost an off
23 the cuff question then it would tend to show that the Maldonado
24 question whether the question or the answer was not material to
25 whatever investigation was going on in that regard.

1 MR. AUERHAHN: Your Honor--

2 MR. CARNEY: Whereas if Yemen was a ruse to distract
3 the defendant and the real focus was on Maldonado then that
4 would be different and I'm trying to establish that by
5 reviewing the only conversation that is critical in this entire
6 case.

7 THE COURT: I think you can review whatever you want
8 in terms of what was asked, what was discussed, how much time
9 they spent, how they asked the question, what other questions
10 they asked. The - as to whether they were investigating other
11 things in terms of probable cause I don't see that that
12 matters. They've averred that this matter was under

13 investigation and I understand the larger argument that you're-
14 MR. CARNEY: I mean Your Honor is talking about
15 whether my questions are material to this hearing. The way a
16 determination is made about whether these questions are
17 material to this hearing is based on, respectfully, what's in
18 Your Honor's head, what you're thinking is. If you think it's
19 material, it's material. If you don't think it's material,
20 it's not material. So as to whether--

21 THE COURT: I don't need to know about the other
22 investigations.

23 MR. CARNEY: I understand, Your Honor. But my point
24 is that it's not based on what I say and what the answer is
25 solely. It's based on what are you looking for in the context

1 of this hearing. Well, it's the same analogy when you're
2 talking about these agents.

3 THE COURT: Mmm-hmm.

4 MR. CARNEY: It's not just what was said and what was
5 the question, what was the answer. If you're going to explore
6 materiality then what was in your head? What were you focused
7 on in this conversation? What was going to be material to your
8 conversation? For example, was it material if they asked
9 about--

10 THE COURT: I don't think of materiality as a measure
11 of how material it was to what they were thinking at that
12 moment in their head as much as was it material to an
13 investigation they were undertaking. They have averred that
14 they were undertaking an investigation into this matter that
15 was the subject of at least one or two questions of your client
16 according to the complaint affidavit. So that's how I would be
17 thinking about materiality in terms of this hearing. So--

18 MR. CARNEY: I would agree. And so in order to
19 explore that I should have some limited leeway on cross
20 examination to ask them about this conversation not just--

21 The COURT: I think you can ask him about the
22 conversation but I'm not that interested in to the extent that
23 other things were asked and you can ask him about the other
24 things that were asked but I'm not that interested in whether
25 those were the subject of active investigations or not. Or

1 became, I don't know if they were at the, before, during or
2 after.

3 MR. CARNEY: If they were the focus of the
4 investigation and they took up nine-tenths of the conversations
5 and the question about Maldonado took up one one-hundredth of
6 the conversation does that raise a question about how
7 material--

8 THE COURT: You can ask that. I haven't overruled
9 you from asking that.

10 MR. CARNEY: All right.

11 BY MR. CARNEY:

12 Q. What percentage of the conversation focused on his travel
13 to Yemen?

14 A. I don't know.

15 Q. What percentage of the conversation focused on his
16 knowledge of Maldonado?

17 A. I don't know.

18 Q. What were the questions asked of Mr. Mehanna regarding
19 Yemen?

20 A. I believe the question was if he had traveled and the
21 purpose of that travel.

22 Q. Was that the only one or two questions?

23 A. Umm, if I looked at the report that would refresh my
24 memory. I don't know.

25 MR. CARNEY: Fine by me with Your Honor's permission?

1 THE COURT: No problem. Does--

2 MR. AUERHAHN: Your Honor, the witness stated that he
3 read the report. He did not state that he read the report for
4 the preparation of this hearing or to these affidavits. Asking
5 him to read the report and then disclose what's in the report
6 would be simply a vehicle for discovery for Mr. Carney of the
7 report and--

8 THE COURT: The report hasn't been turned over?

9 MR. AUERHAHN: No.

10 THE COURT: Oh. Oh, I assumed that it had but I'm
11 sorry.

12 MR. AUERHAHN: So I don't--

13 MR. CARNEY: He would've answered the question--

14 THE COURT: So I'm confused as to the status. The
15 report of the interview has not been turned - none of it's been
16 turned, no portion of the reports been turned over or?

17 MR. AUERHAHN: The report of the interview of--

18 THE COURT: Of the defendant.

19 MR. AUERHAHN: No, it has not been turned over.

20 THE COURT: Okay. And was he the, he's not the
21 affiant on the affidavit?

22 MR. AUERHAHN: Yes, he is.

23 THE COURT: In the complaint,--

24 MR. AUERHAHN: Yes.

25 THE COURT: --he is? What's the source of his

1 knowledge of the information regarding the information in the
2 complaint?

3 MR. AUERHAHN: We can certainly ask him but it's my
4 understanding that it's a conversation with the case agents.
5 And as indicated in terms of some of the other items sometimes
6 he's looking at, for example, excerpts of transcripts of
7 consensual recordings and such.

8 THE COURT: In terms of the interview were you
9 present at the interview of the defendant?

10 THE WITNESS: No, Your Honor.

11 THE COURT: On December 16th, you were not?

12 THE WITNESS: No, Your Honor.

13 THE COURT: And have you reviewed the, have you ever
14 seen the report? Let me put it this way, in terms of preparing
15 this and the statements you made in the complaint affidavit to
16 the extent that you made statements regarding what happened in
17 the interview what was the basis for those statements?

18 THE WITNESS: That would be based upon portions of
19 the 302 or the results of interview transcripts of consensual
20 recordings.

21 THE COURT: In terms of what he said to the two
22 agents or however many agents it was that interviewed him on
23 that day, December 16th--

24 THE WITNESS: Yes.

25 THE COURT: --what was the basis for your statements

1 in the affidavit about that?

2 THE WITNESS: That would be the written report, Your
3 Honor.

4 THE COURT: I see. All right.

5 MR. AUERHAHN: I apologize, Your Honor. I stand
6 correct. It was my understanding that he did not read the 302,
7 the report.

8 THE COURT: All right. Does that, is that the only
9 basis or did you also talk to the agents about what happened in
10 the interview?

11 THE WITNESS: Your Honor, I stand corrected. I'm
12 thinking of another report. It was not that of Tarek Mehanna.

13 THE COURT: What report, what did you base your
14 statements in the affidavit on about the interview of
15 Mr. Mehanna?

16 THE WITNESS: For that interview that would have been
17 discussions with the case agents. I apologize, I stand
18 corrected. It was another report that I read.

19 THE COURT: And not the 302?

20 THE WITNESS: Not the 302 of Tarek Mehanna.

21 MR. AUERHAHN: Your Honor, I'm glad for that
22 clarification because I believe the 302 he's referring to that
23 he actually read and relied on is excerpts of the 302 of an
24 interview with Maldonado. Those excerpts are part of the
25 discovery in this case. We did turn over that because even

1 though I don't suggest we're necessarily required to under the
2 rules but since he relied on excerpts of 302s of Maldonado as
3 part of, in advance of preparing the affidavit, we did turn
4 over those excerpts and provided them in discovery both to the
5 Court and the defense. The 302 of the interview of Mehanna was
6 not reviewed by this agent.

7 MR. CARNEY: It's a little shocking where the
8 defendant is charged with this federal crime and has been held
9 in custody since his arrest based on a conversation that he had
10 with these agents that I'm not permitted to get leeway to ask
11 about that conversation. And this idea that we'll give you a
12 sentence from here and a sentence from there and therefore deny
13 me the ability to ask this agent just the basic facts of the
14 conversation that occurred indeed I'm taking--

15 THE COURT: What about--

16 MR. CARNEY: --my advice from Your Honor when you
17 said why don't I ask him about it. And so I'm asking about it
18 and I think that cross examination would have been done a half
19 an hour ago if I could just ask this agent the questions about
20 this conversation.

21 THE COURT: What about that. Now we're talking about
22 what was - I mean he's charged with the crime of making a false
23 statement in the course of an interview with one or more FBI
24 agents for not just a detention hearing but a probable cause
25 hearing. It would seem in the ordinary course that the context

1 of those statements, that is not just the question and answer
2 that would form the basis for the charging instrument but the
3 entire conversation, the entire interview, would at least be
4 subject to cross examination and available. It might be
5 meaningful if it was a two and a half hour interview, I don't
6 know if it was, of the two and a half hour interview none of
7 which focused on Mr. Maldonado and literally be, oh by the way
8 one question. It may well support the charge but it would be a
9 different context then if it was a 20 minute interview and
10 somebody walked in and said this is what we're going to talk to
11 you about, this is the topic, here's this, boom, ask these
12 questions. You understand. I mean this isn't rocket science.

13 MR. AUERHAHN: But, Your Honor, you know as we say in
14 the affidavit in support of the complaint or as the agent says,
15 much of the interview concerned something else. I mean that
16 is--

17 THE COURT: Yeah. No, I understand that.

18 MR. AUERHAHN: And then there, you know, he was shown
19 a photograph. He acknowledged how long he knew him, when he
20 had last seen him, when he had last spoken to him, what he was
21 doing, the nature of their contact and when they last spoke on
22 the telephone, where he was living. So the, you know, the
23 context in terms it wasn't, oh by the way where's Daniel
24 Maldonado, is set forth that that was not what--

25 THE COURT: But that's the - right. Yes, I

1 understand but that's, but that's one side context and that
2 might be at the end of the day the context that I rely upon.
3 But he wants to test that.

4 MR. AUERHAHN: But that's point number one. Point
5 number two, again, I mean if it were a 200 page transcript of
6 testimony in the grand jury and on page 75 the witness asked
7 and answered a question untruthfully and we could prove they
8 knew it was untruthful, it would still be the basis of a
9 perjury count even though it was only on page 70 whatever of a
10 100 page transcript.

11 THE COURT: But it might be a basis for cross
12 examination that would enter into the process before somebody
13 came to the conclusion that the statement was made with all the
14 requisite requirements necessary to support the charge. And
15 for that they might want to see the rest of the transcript and
16 might be entitled to ask about that.

17 MR. AUERHAHN: Your Honor, most respectfully, not at
18 a probable cause hearing. Certainly at trial, you know,
19 there's different factors, different circumstances, different
20 issues of discovery but this is a probable cause hearing as to
21 whether or not the statements he made about Maldonado in fact
22 were untrue and whether he knew they were untrue. Limit it to
23 that.

24 MR. CARNEY: I submit that it's not limited to that.
25 If the statements were not material to the investigation then

1 they don't meet the criteria for a false statement. If he
2 asked my client did the Red Sox win last night and my client
3 says, yes, they did and it turns out that they didn't, I don't
4 think he'd be sitting here because it would not be material to
5 the federal investigation. In order for me to put this into
6 context I'm just trying to elaborate on the conversation so
7 that we can see if it was the focus of the investigation or if
8 a hour and a half interview preceded the one minute of
9 questioning that the government has just elicited, has just
10 pointed to in the transcript.

11 MR. AUERHAHN: But again materially--

12 MR. CARNEY: You can ask the questions and get the
13 answers that he just referred to in less than a minute. Indeed
14 he just recounted them to Your Honor in probably 15 seconds so
15 let's hear about the rest of the interview.

16 MR. AUERHAHN: Again, he wants the discovery of the
17 rest of the interview. He's not focusing on the answers to the
18 questions about Maldonado. And let's not forget this is an
19 individual, you have further information from Maldonado who
20 subsequently pled guilty to receiving terrorist training from
21 al-Qaeda. So the issue of materiality as to the fact that he
22 was in Somalia fighting Jihad at the time--

23 THE COURT: Is the discovery issue one that is a
24 question of timing? Or is this an issue that I'm going to see
25 again and let's suppose that he is indicted at some point in

1 time, and let's suppose then we're in the ordinary discovery
2 phase of the case am I--

3 MR. AUERHAHN: Ordinary discovery is statement to
4 the, by the defendant to people known to him to be law
5 enforcement is part of automatic discovery so the entirety of
6 the 302 would then be turned over. But at this stage of the
7 proceeding--

8 THE COURT: So it's a timing question?

9 MR. AUERHAHN: Yeah. At this stage--

10 THE COURT: So in other words you don't anticipate
11 seeking as would potentially be your right in some
12 circumstances under Rule 16 to not disclose the statements of
13 the defendant?

14 MR. AUERHAHN: Not with reference to this 302. But I
15 do want to say again, at this stage of the proceedings, 1) I
16 don't believe any of the Rules of Discovery or Rules of
17 Evidence that might otherwise require discovery--

18 The COURT: No--

19 MR. AUERHAHN: --of limited portions of documents
20 would apply. But even if they would apply as we, without being
21 required to do so turned over excerpts of other 302s, it would
22 only be the excerpt of the conversation about Maldonado that we
23 would turn over. If we were to follow - if he had read it, if
24 he had relied on it, if we followed the same discovery rule
25 that we imposed on ourselves, we would only turn over the

1 portions that related to Maldonado, not the rest of the 302
2 cause that's not the subject matter of his direct testimony.

3 MR. CHAKRAVARTY: Your Honor, I basically second that
4 proposition. This is a probable cause hearing. Of course at
5 trial where the materiality, that statement, the context of the
6 statement is much more at issue--

7 THE COURT: I guess the thing that, the analogy I
8 sort of think of, if you said he committed perjury at a trial,
9 you said question, answer, and the defense attorney then said
10 well I'd like to examine him as to why he was testifying, what
11 the trial was about, what court it was in. Those would seem to
12 be potentially, even at the much lower standard of a probable
13 cause hearing, relevant questions. And so - they might not be
14 the most probative. They might not be as probative as the
15 ones, as the points that you suggest, Mr. Auerhahn, about what
16 was the question, what was the answer, was it truthful or not?
17 But they would be--

18 MR. CHAKRAVARTY: They're relevant in that
19 circumstance, if I may just finish that thought--

20 THE COURT: Yes.

21 MR. CHAKRAVARTY: --because they go to the ultimate
22 issue of materiality, whether it was proof beyond reasonable
23 doubt that those statements made to the government agent were
24 made in court were material to the proceeding or whatever.
25 Here the question for you is whether there was sufficient

1 probable cause. And anything that negates that probable
2 cause, you know, to the extent that it does negate the probable
3 cause there is an argument to be made along the lines you're
4 suggesting.

5 The confusion here I think, Your Honor, and the
6 reason why we've now been spending some time on this I think
7 has been the discovery questions. And I think Agent Nambu had
8 testified because we gave a volume of discovery to the defense
9 and it was selective, it had certain excerpts of 302s, it had
10 the material that essentially the witness read and prepared for
11 before preparation for this proceeding. There may be an
12 appearance that we've been a little fast and cute with what
13 we've produced because we have not produced the very substance
14 of the statement. I'd suggest that one of the reasons for that
15 is because we understand how important that statement, which is
16 the subject of this criminal case, is going to be at trial.
17 This witness did not participate in that interview. He is
18 armed with only very limited knowledge of that interview. To
19 go down Mr. Carney's line of questioning and explore the very
20 context which Your Honor's suggesting may be relevant or
21 material is a fool's errand here. The agent doesn't know. He
22 wasn't there and I think as may be elaborated and if the
23 foundational questions are necessary he can go there--

24 THE COURT: This is what I'm going to do--

25 MR. CHAKRAVARTY: --he would be able to say he hadn't

1 discussed them.

2 THE COURT: I'm going to for now reserve on thinking
3 about these issues and where they go and ask you for now,
4 Mr. Carney, to move on. I want to think about these issues a
5 little more. They raise issues that don't ordinarily, that I
6 don't ordinarily, I'm not ordinarily forced to confront in a
7 probable cause hearing. So I want to think about them a little
8 more. So--

9 MR. CARNEY: When they say they were fast and cute I
10 agree they were fast.

11 THE COURT: Why don't you move on to other areas and
12 I'll note that you're pressing that issue and think about it
13 and we'll revisit it appropriately or after I think about it
14 some more.

15 BY MR. CARNEY:

16 Q. What have you reviewed, sir, in regard to the questioning
17 of my client that concerned Mr. Maldonado?

18 A. With regard to the questioning of your client to that
19 interview - that pertain directly or indirectly?

20 Q. Both, please?

21 A. Indirectly I reviewed excerpts of transcripts of recorded
22 conversations. And the portions that I read pertain to the
23 statement he made regarding Daniel Maldonado, where he was at
24 that time.

25 Q. And have you spoken to the agents about that as well?

1 A. Yes.

2 Q. You note in your affidavit, sir, that the conversation
3 between the agent and the defendant occurred on December 16,
4 2006; is that correct?

5 A. Yes.

6 Q. And you also refer to a consensually recorded conversation
7 between a cooperating witness and Mr. Mehanna that occurred on
8 December 13, 2006; is that correct?

9 A. Yes.

10 Q. Was that conversation being simultaneously monitored by
11 the agent?

12 A. I don't understand your question.

13 Q. At the time that conversation between the cooperating
14 witness and Mr. Mehanna was going on, on December 13 of 2006
15 were the agents simultaneously listening to the conversation?

16 A. I'm not sure. I don't know. Whether they were hearing it
17 at the time or if the device, if they listened to it on the
18 device at a later time I'm not sure.

19 Q. When were the agents first told about that conversation?

20 A. I don't know.

21 Q. Were you selected as the affiant based on your knowledge
22 of this case or your ignorance of this case? I'll withdraw the
23 question.

24 When did the agent learn of the content of the
25 conversation of December 13?

1 A. I'm not sure of that either.

2 Q. Did they know it before they spoke to Mr. Mehanna?

3 A. I'm not certain, I'm not certain if they did or not.

4 Q. Why did they decide to ask Mr. Mehanna about Daniel
5 Maldonado when they questioned him on December 16?

6 MR. AUERHAHN: Objection, Your Honor. In light of
7 our previous discussion about the reasons for the asking of the
8 question I think we've gone over this.

9 THE COURT: For now I'm going to sustain that.

10 MR. CARNEY: I don't want to delay the detention
11 hearing of my client, but I am considering asking the Court to
12 suspend the probable cause portion of this hearing so I can
13 call the agents who were directly involved--

14 THE COURT: I'm going to--

15 MR. CARNEY: --in this--

16 THE COURT: What I want to do--

17 MR. CARNEY: --who might have some relevant
18 information.

19 THE COURT: --Mr. Carney, is why don't we proceed - I
20 don't want to cut you off on the probable cause portion if you
21 have other things you want, but as to this area which we spent
22 a fair bit of time discussing I think you should move on
23 because I want to, I understand the nature of your argument, I
24 understand the nature of the government's objection. So far I
25 haven't permitted you to inquire further into it but I want to

1 think about it a little more carefully, and so why don't we
2 proceed to - if you have other areas of probable cause that
3 don't raise those issues feel free to go into them otherwise
4 let's proceed to the detention issues.

5 MR. CARNEY: May I just have a few more questions and
6 then I can suspend.

7 THE COURT: Fine.

8 BY MR. CARNEY:

9 Q. When the agents went to see Mr. Mehanna, what did they
10 know about where Daniel Maldonado was located?

11 MR. AUERHAHN: Objection.

12 THE COURT: Same basis, Mr. Auerhahn?

13 MR. AUERHAHN: Yes, Your Honor.

14 THE COURT: All right. For now, Mr. Carney, I'm
15 going to sustain that too. I want to think about all these
16 issues.

17 BY MR. CARNEY:

18 Q. As a result of the interview on December 16, 2006 with
19 Mr. Mehanna, what did the task force do in regard to which
20 investigation of Mr. Maldonado?

21 MR. AUERHAHN: Objection, Your Honor. That's a
22 pretty wide open question in terms of the what happened in the
23 investigation, everything that happened after December 16,
24 2006.

25 MR. CARNEY: No, I qualified the question and I'll

1 repeat it if I may.

2 THE COURT: Mmm-hmm.

3 BY MR, CARNEY:

4 Q. What did the task force do as a result of the information
5 obtained on December 16th from Mr. Mehanna in regard to your
6 investigation of Mr. Maldonado?

7 A. The investigation was--

8 THE COURT: Wait, wait, wait, wait, wait, wait.
9 There's an objection.

10 MR. AUERHAHN: I object, Your Honor, in terms of what
11 the investigators did as a result of the information they
12 received. Again it's an effort to get into the investigative
13 steps of and focusing away from the issue--

14 THE COURT: Well does that go to materiality, whether
15 they did something, what they did, if anything or no?

16 MR. AUERHAHN: Well again, my view of materiality,
17 Your Honor, is that the kind of information that is, could have
18 affected the investigation. So again, lying about the
19 whereabouts of someone who's in Somalia who's fighting Jihad
20 who subsequently pleads to receiving training from al-Qaeda in
21 my view establishes materiality. Now whether or not--

22 THE COURT: Wouldn't that depend on what the
23 investigation is? It wouldn't be material to investigation of
24 the robbery at the bank in Braintree the other day.

25 MR. AUERHAHN: But it's the, the requirement is that

1 the material within the - essentially in the case of the lying
2 to the FBI within the investigative jurisdiction of the FBI. I
3 mean even if there--

4 THE COURT: Okay. I see.

5 MR. AUERHAHN: --hadn't been an open investigation of
6 Maldonado at that point but if he had at that point--

7 THE COURT: It would be material even if there were
8 no investigation?

9 MR. AUERHAHN: Right.

10 THE COURT: I see.

11 MR. AUERHAHN: And that's why for example, you know,
12 a false statement to the FBI about someone--

13 THE COURT: All right, I'll sustain the objection.

14 MR. CARNEY: May I be heard?

15 THE COURT: Yes.

16 MR. CARNEY: I disagree with the framework that the
17 government has tried to set out here. If the task force knows
18 for a fact that Daniel Maldonado is in Somalia, they know for a
19 fact, and they ask someone do you know where Maldonado is and
20 the person says I think he's in Egypt and the agents don't do a
21 thing because they know where Maldonado is, then that answer
22 would be viewed as not material to their investigation because
23 they know - if their investigation is to determine where so and
24 so is and they know absolutely where he is then there's another
25 reason why they're asking the defendant these questions. For

1 example, if I walked out of this courtroom and someone walked
2 up to me who knew Your Honor was on the bench, had seen Your
3 Honor on the bench and asked me where you were and I said I
4 don't know, well that person would know where you are. If he
5 was trying to find you he would walk in this courtroom and
6 there you would be. So would my false statement to him have
7 affected what he was going to do when he already knew the
8 answer? No.

9 So what I'm trying to ask here by this question is
10 based on what Mr. Mehanna asked you did you do anything--

11 THE COURT: I--

12 MR. CARNEY: And if the answer is no, we didn't do a
13 blessed thing because we knew it was inaccurate. We have--

14 THE COURT: It may - I understand.

15 MR. CARNEY: We have Maldonado--

16 THE COURT: I understand.

17 MR. CARNEY: --under surveillance in Somalia.

18 THE COURT: I'm going to sustain that objection. It
19 may well be that that is relevant and significant in the case
20 at a later stage and if in fact it was as clear to the agents
21 who asked him the question as it is to the people in the room
22 at this moment that I'm sitting here that might be something
23 but for purposes of probable cause I don't, I think I'm going
24 to sustain the objection.

25 BY MR. CARNEY:

1 Q. Did the task force make any decisions based explicitly on
2 what Mr. Mehanna said that related to the investigation or that
3 were material to the investigation of Daniel Maldonado?

4 MR. AUERHAHN: Same objection, Your Honor.

5 THE COURT: I'll sustain it for the same reason.

6 MR. CARNEY: I have no further questions.

7 THE COURT: All right.

8 MR. AUERHAHN: No redirect, Your Honor.

9 THE COURT: All right, you can step down, agent.
10 Thank you very much for your testimony.

11 WITNESS EXCUSED

12 MR. AUERHAHN: No further evidence from the
13 government, Your Honor.

14 THE COURT: All right. Anything, Mr. Carney?

15 MR. CARNEY: Yes, I would ask to suspend so that I
16 can call the two agents directly involved in the questioning of
17 Mr. Mehanna so that I can ask them the questions of what they
18 asked during the interview.

19 THE COURT: I'm going to reserve on that for the same
20 reason on some of the objections I reserved on.

21 MR. CARNEY: I understand, Your Honor.

22 THE COURT: Do you have anything you want to offer
23 on, beyond what you have offered in writing with respect to the
24 detention question?

25 MR. CARNEY: I don't want to belabor what I've

1 submitted and I won't be redundant, but the most important
2 fact here is that we are dealing with a person who is a United
3 States citizen, no prior criminal record, no activities
4 involving violence or threats of violence whatsoever, who lives
5 in Sudbury with his parents who are also United States
6 citizens. He just gradu--

7 THE COURT: Let me ask you this, not to cut you
8 short.

9 MR. CARNEY: Too late. Too late, you are, but go
10 ahead.

11 THE COURT: Do Mr. Mehanna's parents own the home
12 they live in in Sudbury?

13 MR. CARNEY: Yes, they do, Your Honor.

14 THE COURT: And--

15 MR. CARNEY: And they are prepared to post a portion
16 of it that's suggested by the pretrial services.

17 THE COURT: They are prepared?

18 MR. CARNEY: Yes, Your Honor.

19 THE COURT: Are they here today?

20 MR. CARNEY: Yes, Your Honor, they are. Mr. Mehanna?

21 THE COURT: All right. So, Mr. and Mrs. Mehanna, do
22 you own the home together? Is it in both your names?

23 MR. MEHANNA: Yes.

24 MRS. MEHANNA: Yes.

25 THE COURT: It's in both your names, all right. Then

1 I'll direct these questions to both of you. Let me ask you
2 this, you've heard the charge that's been lodged against your
3 son?

4 MR. MEHANNA: Yes.

5 THE COURT: All right, you understand he's charged
6 with making a false statement to agents of the Federal Bureau
7 of Investigation?

8 MRS. MEHANNA: Mmm-hmm.

9 THE COURT: And you understand that it relates to an
10 investigation the FBI was conducting into another individual
11 and that person's involvement with terrorism activities; isn't
12 that fair to say, Mr. Auerhahn?

13 MR. AUERHAHN: Yes, Your Honor.

14 THE COURT: All right. You heard all that, right?

15 MR. MEHANNA: We did.

16 MRS. MEHANNA: We have.

17 THE COURT: And you understand that? What's the
18 maximum punishment, Mr. Auerhahn or Mr. Chakravarty, that
19 Mr. Mehanna faces?

20 MR. AUERHAHN: Eight years imprisonment, a \$250,000
21 fine, three years supervised release and a \$100 special
22 assessment.

23 THE COURT: All right. And that's the statutory
24 maximum?

25 MR. AUERHAHN: Yes.

1 THE COURT: All right. So he faces up to eight
2 years in prison as well as a quarter million dollar fine or
3 both as punishment for this. And the question I ask of you is
4 it has been suggested to me by pretrial services, which is an
5 arm of the court, that if your son were to be released he
6 should be released on, part of the condition be that you post
7 your home to secure or guarantee his appearance and possibly it
8 might be to also guarantee his compliance with any conditions
9 that I impose. Let me explain what that means. It would mean
10 if you do it that as long as, if he were to be released, if you
11 did it and if he were to be released, and I'm not suggesting I
12 am yet, I haven't even heard from the government, but it would
13 mean that if he appeared throughout the case and if he complied
14 with all his conditions and did everything that was required of
15 him and did nothing of those things that were prohibited to
16 him, at the end of the case whether he was convicted or
17 acquitted, whether he went to jail or not, the house would be
18 yours.

19 MR. CARNEY: May I interrupt briefly, please?

20 THE COURT: Yup.

21 MR. CARNEY: I believe pretrial services is seeking a
22 secured bond--

23 THE COURT: Bail only but I'm asking about--

24 MR. CARNEY: --in the amount of 100,000.

25 THE COURT: Oh, as to the amount you mean?

1 MR. CARNEY: Yeah, it's 100,000 secured bond.

2 THE COURT: How much equity is in the house?

3 MR. CARNEY: Probably seven figures, Your Honor.

4 It's owned free and clear. It is assessed; I have an
5 assessment of the house as approximately 900,000.

6 THE COURT: All right. Well I'll start at the top
7 notwithstanding their suggestion.

8 So if you were to post the home, as long as he did
9 what was required and didn't violate any of the conditions at
10 the end the lien, the government's lien on the house would be
11 returned and ripped up. But if he violated the conditions
12 then, or did not appear as required, then you could lose the
13 home, maybe just \$100,000 of it, maybe all of it, maybe
14 somewhere in between. Do you understand that?

15 MRS. MEHANNA: Yeah.

16 MR. MEHANNA: We do, yes.

17 THE COURT: Okay. And is that something you'd be
18 prepared to do?

19 MR. MEHANNA: Yes.

20 MRS. MEHANNA: Yes.

21 THE COURT: You would, all right. Who lives in the
22 home?

23 MR. MEHANNA: The two of us and Tarek.

24 MRS. MEHANNA: And my son.

25 THE COURT: And your son, this son?

1 MRS. MEHANNA: Yes.

2 THE COURT: All right. How many children do you
3 have?

4 MRS. MEHANNA: We have two children.

5 THE COURT: And where is your other child?

6 PAUSE

7 THE COURT: I see. And does he live in the United
8 States with you or in Sudbury?

9 MR. MEHANNA: In Boston.

10 MRS. MEHANNA: Yes, here. In Boston.

11 THE COURT: But not in your home?

12 MR. MEHANNA: In Boston, yes.

13 MR. MEHANNA'S BROTHER: I live in Boston.

14 THE COURT: All right. You have your own apartment?

15 MR. MEHANNA'S BROTHER: Yes.

16 THE COURT: Okay. Do you own any other real estate,
17 Mr. and Mrs. Mehanna?

18 MR. MEHANNA: No.

19 THE COURT: No other real estate?

20 MRS. MEHANNA: No.

21 MR. MEHANNA: No.

22 THE COURT: All right. How long have you lived in
23 this home?

24 MRS. MEHANNA: Seven years.

25 MR. MEHANNA: Nine years.

1 MRS. MEHANNA: Oh, nine years.

2 THE COURT: Nine years.

3 MR. MEHANNA: Since '99.

4 THE COURT: Since '99, all right. And you're not
5 concerned, you're confident your son would do whatever's
6 necessary?

7 MR. MEHANNA: We are.

8 MRS. MEHANNA: We are.

9 THE COURT: It's a big, a big risk, right? You put
10 your house in the hands of the Court and the government and in
11 your son. What if he, you know, doesn't honor that? Do you
12 think he'll honor what you do for him?

13 MRS. MEHANNA: Yes.

14 MR. MEHANNA: We think he will honor but if that's
15 what it takes to have him out I have no hesitation and his
16 mother have no hesitation.

17 THE COURT: All right.

18 MR. CARNEY: I believe what they mean is they think
19 Your Honor could release him on unsecured bond and they are
20 confident that he would come back and there is no need to have
21 a secured bond represented by their home, but if that's what
22 the Court wants them to do they are prepared to do that.

23 THE COURT: All right.

24 MR. CARNEY: I interpret their statement in that
25 regard.

1 THE COURT: All right.

2 MRS. MEHANNA: Exactly.

3 MR. CARNEY: Did I say that correctly?

4 MR. MEHANNA: Yes.

5 MRS. MEHANNA: Yes, exactly.

6 THE COURT: All right. Are there any other things
7 that you think I should inquire of them, Mr. Auerhahn or
8 Mr. Chakravarty?

9 MR. AUERHAHN: Excuse me one moment, Your Honor.

10 PAUSE

11 MR. AUERHAHN: Not at this time, Your Honor.

12 THE COURT: Okay. All right, thank you very much.
13 You can sit down.

14 All right, so essentially I understand then,
15 Mr. Carney, what you're proposing him to be released on is an
16 unsecured bond conditioning live and stay here. You'll agree
17 to the conditions that pretrial proposes in which case the
18 security would come from the parents and in the form of the
19 house, is that how they would meet the security?

20 MR. CARNEY: Yes, Your Honor.

21 THE COURT: And--

22 MR. CARNEY: I discussed it with Mr. Gladden. He was
23 aware of my position of a \$50,000 unsecured bond. When he
24 indicated he was recommending a 100,000 secured bond I told him
25 that I would tell Your Honor that would be acceptable.

1 THE COURT: All right. Okay. What about, you know,
2 I understand - and I'll give you a chance in a minute
3 Mr. Auerhahn and Mr. Chakravarty, but I understand, you know,
4 that as I'm sure will be an essential part of the government's
5 argument or an important part of their argument is the fact
6 that he had a one way ticket to Saudi Arabia, that he was going
7 to relocate and you don't really dispute that. He was going
8 there. He was going to relocate his life there. What about
9 that in terms of risk here?

10 MR. CARNEY: Well it has to be put in the context of
11 the fact that first the conversation occurred in December of
12 2006. My client if the phone calls are to be believed realized
13 he may have made an error in judgment pretty promptly. That
14 was not the last time the agent went to see him. They went to
15 see him again as recently as April of 2008 and they put a lot
16 of pressure on him in April of 2008. Certainly enough pressure
17 so that if a person was going to flee he had just been told
18 enough by the agent to give him every incentive in the world to
19 flee. What did he do? He obtained counsel instead.

20 THE COURT: Did they tell him he was going to be
21 arrested?

22 MR. CARNEY: They told him that he, that if he did
23 not become a cooperating witness for the FBI he would be
24 charged and they said that in no uncertain terms. He retained
25 counsel. Counsel communicated with the United States

1 Attorney's Office and he communicated that if they were going
2 to charge Mr. Mehanna he will surrender. That was in April.
3 May went by, nothing. June, nothing. July, nothing. At some
4 point he has to get on with his life. He's a graduate of a
5 college of pharmacy and he obtained a position at a prestigious
6 medical facility.

7 THE COURT: What would he do if he were released?

8 MR. CARNEY: He would see if he could go back to work
9 at Walgreens where he's worked as a pharmacist or CVS where he
10 interned as a pharmacist or Children's Hospital where he
11 interned as a pharmacist. The fact that his father has
12 probably taught, I daresay the majority of pharmacists in the
13 Commonwealth given his position and length of service as a
14 professor at Mass College of Pharmacy, I suspect my client can
15 get a job as a pharmacist.

16 THE COURT: All right.

17 MR. MEHANNA: And that's what he would want to go
18 back to do. He would remain living at home with his family.
19 The medical center in Saudi Arabia has already been notified
20 that don't expect him and so he would live at home, work at a
21 pharmacy if he could in Massachusetts. If he can't do that he
22 will get other gainful employment. He's been employed
23 consistently since he was a teenager.

24 THE COURT: All right. What about that, Mr. Auerhahn
25 or Mr. Chakravarty, I'll hear you?

1 MR. CHAKRAVARTY: With regard to his employment?

2 THE COURT: Well the whole--

3 MR. CHAKRAVARTY: The whole argument?

4 THE COURT: The whole argument of detention.

5 MR. CHAKRAVARTY: Your Honor, there has been a, in
6 pointing to Mr. Mehanna's family who obviously this case is not
7 about and there is nothing derogatory, and nothing but
8 indications that they're upstanding, successful, everything
9 that you would ask for in a surety for purposes of a, this
10 decision. There's a danger here that we're confusing in their
11 analysis of their stability with the defendant. The defendant
12 is the one who knew that his friend had made the journey from
13 Massachusetts to a terrorist training camp. It happened to be
14 in Somalia no less training with al-Qaeda, knew all these
15 details and affirmatively lied about that to the FBI,
16 acknowledged that he had done something that was irreparable in
17 the sense of he had, he was already in trouble purely from
18 lying to the FBI. And in the face of that knowledge and then
19 as Mr. Carney suggests even after he was told by the government
20 that, yes, we know that you lied about this and that's very
21 serious, he took the steps anyway - I didn't get a phone call,
22 Your Honor, the FBI didn't get a phone call, he took the steps
23 anyway to secure a one way ticket to the Kingdom of Saudi
24 Arabia where the defendant had never lived where--

25 THE COURT: Here's my question, okay, it doesn't

1 strike me, tell me if I'm wrong, but it doesn't strike me that
2 what you have is someone who prepared to flee from prosecution
3 in the sense that what I see in the record is he had a
4 conversation two years ago. And the record before me he had an
5 awareness that he had lied in that conversation. That
6 awareness may be as Mr. Carney suggests it was, realized it was
7 a lapse of judgment and that awareness may have been I knew
8 what I did and I did it with a purpose behind it and simply
9 acknowledged what he was doing. There are a variety of ways
10 probably to understand that. But he was here. He had that
11 understanding at that time and didn't go.

12 He went on - what it appears that I have before me is
13 he went and he finished his studies. He graduated in May and
14 he looked for a job. He clearly looked for a job overseas. He
15 clearly arranged to move his life to Saudi Arabia. He had a
16 one way ticket. Clearly he was intending for at least a
17 substantial period of time, if not possibly the rest of his
18 life to relocate to Saudi Arabia. And as you point out there's
19 no extradition treaty between Saudi Arabia and the United
20 States. Plainly creates a risk of flight. It doesn't strike
21 me that it was a, the situation where someone got a tip
22 government's coming after me, I think I'm buying a one-way
23 ticket to a country that doesn't have an extradition treaty in
24 that sense. I don't mean to suggest that it doesn't create a
25 risk of flight, it does. And my question is, in the calculus

1 then given what you have on the, on all the different factors,
2 yes, he stands differently than his family.

3 On the other hand family ties are significant
4 especially to risk of flight and they're prepared to post their
5 house as security potentially for both appearance and
6 compliance. And so I guess my question is what about that?
7 We're no longer in the situation where it's personal
8 recognizance verse all of the evidence.

9 MR. CHAKRAVARTY: First, while your analysis is
10 obviously accurate with regards to this is not the typical case
11 where somebody's just learning that something's going to happen
12 to them. But here the motives for the defendant even wanting
13 to go over there and searching for a job over there when here
14 he had, I mean he's working at Walgreens I believe,
15 significantly different job then the one according to the
16 contract which the defense has put into evidence, which he was
17 going to be making the equivalent of, you know, almost \$100,000
18 or something thereabouts over there, a lucrative job where he
19 can actually--

20 THE COURT: He'd make a lot more money there than
21 here.

22 MR. CHAKRAVARTY: Exactly.

23 THE COURT: Cause he makes more money there?

24 MR. CHAKRAVARTY: Much more over there.

25 THE COURT: I see.

1 MR. CHAKRAVARTY: And I don't know what he makes
2 here, Your Honor, but I can't imagine it would be on that
3 order.

4 THE COURT: All right.

5 MR. CHAKRAVARTY: I'd suggest that it's important
6 when you're getting back down to what are the defendant's ties,
7 what's keeping him here? He's not married. He has no kids.
8 He's not a child. He's 26 years old. Clearly has a doctorate,
9 very well educated. According to public sources, on the
10 internet, he has a very robust network of individuals with whom
11 he communicates regularly on the internet. I think--

12 THE COURT: How do I know that?

13 MR. CHAKRAVARTY: I'm proffering that in terms of--

14 THE COURT: All right.

15 MR. CHAKRAVARTY: --just things I've seen on the
16 internet on public sources. Just plugged in the defendant's
17 name frankly and a number of sources came up indicating, take
18 it with whatever grain of salt you would wish, but I'd suggest
19 to you the fact that we have a full courtroom here is also
20 testament to the fact that his network, his network although
21 not necessarily the network here locally, is broad. The fact
22 that he knew--

23 THE COURT: Ordinarily though when I see a full
24 courtroom full of people supporting a defendant if I weigh that
25 against the government, I weigh it in favor of the defendant--

1 MR. CHAKRAVARTY: Sure. Absolutely.

2 THE COURT: --there are a lot of people who care
3 about him, a lot of connection to the community, lot of people
4 willing to take the time out of their day. I mean we all work
5 here but they all had to take time out from making money or
6 working or going to school or taking care of their children,
7 whatever they do in their life to come here.

8 MR. CHAKRAVARTY: And I would say--

9 MR. CARNEY: I'm going to quote Mr. Chakravarty the
10 next time I'm sitting in court with a CJA client who has no one
11 in the back of the courtroom and use that as an argument as to
12 why he's not a risk of flight because nobody cares about him.
13 He's got no friends. No one would come to court so please
14 release him on his personal recognizance.

15 MR. CHAKRAVARTY: I would suggest to you, Your Honor,
16 your observations are accurate in the vast majority of the
17 case, and I'd suggest to you it's the context for which these
18 people are here today, and I don't know, and I don't know that
19 we need to waste the time in asking each of them but which is
20 very different than in the typical case where it's people in
21 the community suggesting this is a person who we are vouching
22 for in terms of their stability.

23 In this context I'm suggesting to you that it's a
24 broader network such that his virtual world is really where,
25 what is his anchor? Not the fact that he's making money and he

1 needs to stay with his parents to survive. This is a person
2 who was going to pick up, leave, take his worldly belongings
3 including I emphasize the fact that he is, he has his Egyptian
4 birth certificate. He's an Egyptian citizen for all intents
5 and purposes. He could leave through our porous borders at any
6 time. And I'd suggest to you that at 26 years old, and I don't
7 know what--

8 THE COURT: You guys haven't made the borders
9 unporous?

10 MR. CHAKRAVARTY: We're working on that, Your Honor.
11 But - and his parents, with all due respect to their efforts,
12 simply cannot control a 26 year old man of the defendant's
13 intelligence who has such a broad network. And at whim--

14 THE COURT: Isn't in part the question whether given
15 that they're willing to take their house and move it to the
16 middle of the table whether he would walk out on that and leave
17 them without their house.

18 MR. CHAKRAVARTY: And this is where I think the
19 defendant is having his cake and eating it too, Your Honor.
20 This is a person who apparently has CJA appointed counsel
21 suggesting that he doesn't have the means to be able to do
22 anything. Somebody who has at least up till now had his
23 parents even accompany him for his flight to New York so that
24 they could leave. So they clearly knew that he was intending
25 to leave and they have been kind of--

1 THE COURT: Sure.

2 MR. CHAKRAVARTY: --implicit in that. I'd suggest to
3 Your Honor as any loving parents would do, they want to do
4 whatever they can to support their son. And in this case they
5 felt that it was in his interest, I'd suggest to you the
6 evidence suggests, that it was in his interest to leave the
7 country rather than to stay here and confront whatever, try to
8 make his way in this country and confront whatever issues he
9 had with the government. I only suggest that because we simply
10 can't rely on their word, their faith in their son to be the
11 measure. It's not that I doubt their word that they're willing
12 to put up the house. It's their faith in their son is not a
13 measure of whether this man who is willing to pack up and leave
14 everything he had behind. Frankly, it wasn't much except for
15 his contacts, and grant it compromise his parents' position but
16 that would come down to whether that, whether he perceived
17 whether the Court would really forfeit their property.

18 THE COURT: One quick question, Mr. Carney. I don't
19 want to cut you off, Mr. Chakravarty--

20 MR. CHAKRAVARTY: No.

21 THE COURT: Okay. What - not many people come into
22 this courthouse and offer a house in Sudbury to post or have it
23 available to them to post security and own it free and clear.
24 That raises a question that I don't usually ask at these kind
25 of proceedings which is how significant is the house to them?

1 In other words there are some individuals, I have never seen
2 them in here, who if they posted the house, they posted a house
3 it means nothing to them. I don't know that that's the
4 position they're in but what, how do I know what their
5 financial position is and what else they have? They don't own
6 any other real estate they told me but how do I know how
7 significant this home is to them in terms of a financial, a
8 financial payment if something happened if they lost it?

9 MR. CARNEY: I guess by the same way that any parent
10 knows about the home he or she lives in that you raised your
11 children in and that you live in. Because of thrift, because
12 of not devoting your money to frivolous pursuits you are able
13 to pay down the mortgage that you obtain. My client's mother
14 takes children in to take care of them in her home. My
15 client's father is a college professor. It is possible if you
16 devote your income to paying off the one major debt you have
17 that you are able to do so in a career and my client's father
18 has been a professor throughout his entire career. Now even
19 without speaking to them I know that there may be other factors
20 that go into not wanting to owe money and be paying interest on
21 money but I can't speak knowledgeably if those factors affected
22 this particular family.

23 THE COURT: I see. All right.

24 MR. CARNEY: But they, this is their asset.

25 THE COURT: This is what I'm going to do, I'm going

1 to take the matter under advisement for a couple reasons.
2 First, I want to read the letters that Mr. Carney submitted and
3 I haven't had the opportunity to read them, and so I know all
4 the information that I have available and I want to have the
5 opportunity to read with a little more care the pretrial
6 services report which I just received as the hearing started.
7 I want to think about the issues that the parties raised. I
8 will do one of a couple things. I'll either issue an order
9 detaining the defendant. I'll issue an order setting out
10 conditions of release either which I'll do fairly promptly or
11 I'll set it down for another hearing very soon to, if I have
12 something else I want to address with either or both of you.
13 And at that point in time I'll address, have thought about it
14 and address what the issues you've reserved on or I've reserved
15 on with respect to what you've raised, Mr. Carney.

16 If I were to release the defendant I would give you
17 an opportunity notwithstanding your objection to that to weigh
18 in on what the conditions ought to be and if you - and then
19 there would be a release hearing in any event to set the
20 conditions and so I would hear you then about that.

21 MR. CHAKRAVARTY: Thank you. That was one of the
22 reasons I rose. The other was because I didn't have a chance
23 to emphasize and Your Honor may not be aware, I believe it is
24 in the papers but the potential exposure the defendant has here
25 Mr. Auerhahn mentioned isn't a felony but the guidelines

1 calculation also suggests that it would be under the advisory
2 system, the eight year sentence--

3 THE COURT: Okay. So--

4 MR. CHAKRAVARTY: --would max out. So that's--

5 THE COURT: --the guideline range is--

6 MR. CHAKRAVARTY: Is the same.

7 THE COURT: The guidelines would suggest the eight
8 years?

9 MR. CHAKRAVARTY: Correct.

10 THE COURT: Okay. All right. All right, thank you
11 very much.

12 MR. CARNEY: May I have one other matter, Your Honor?

13 THE COURT: Yup.

14 MR. CARNEY: Your Honor, I have three additional
15 letters that I received too late to make a copy of. I'll make
16 a copy of them for the government and--

17 THE COURT: Give them to Ms. Simeone.

18 MR. CARNEY: --may I deliver them to your clerk?

19 THE COURT: Yes.

20 MR. CARNEY: Thank you.

21 MR. CHAKRAVARTY: Thank you, Your Honor.

22 MR. AUERHAHN: Thank you.

23 THE COURT: Okay. We're adjourned.

24 MR. CARNEY: May I approach the sidebar please?

25 THE COURT: For something other than those three

1 letters?

2 MR. CARNEY: Yes, Your Honor.

3 THE COURT: Sure.

4 MR. CARNEY: And I would ask to do so ex parte.

5 THE COURT: All right.

6 SIDEBAR CONFERENCE - INAUDIBLE

7 THE COURT: All right, we're adjourned.

8 THE CLERK: All rise, this matter's adjourned.

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25 CERTIFICATION

MARYANN V. YOUNG
Certified Court Transcriber
(508) 384-2003

1 I, Maryann V. Young, court approved transcriber, certify
2 that the foregoing is a correct transcript from the official
3 digital sound recording of the proceedings in the
4 above-entitled matter.

5
6 /s/ Maryann V. Young

March 7, 2011

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